

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
v.)	No. SC92003
)	
JERMANE CLARK)	
)	
Appellant.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 11
THE HONORABLE BRYAN L. HETTENBACH, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

JESSICA HATHAWAY
Missouri Bar No. 49671
Office of the State Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
314.340.7662
314.340.7685
jessica.hathaway@mspd.mo.gov

ATTORNEY FOR APPELLANT

INDEX

TABLE OF AUTHORITIES	3
JURISDICTIONAL STATEMENT	6
STATEMENT OF FACTS.....	7
POINT RELIED ON	22
ARGUMENT	24
CONCLUSION	39
CERTIFICATE OF SERVICE AND COMPLIANCE.....	40

TABLE OF AUTHORITIES

CASES

<i>Chapman v. California</i> , 386 U.S. 18 (1967)	26, 38
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	22, 29
<i>Gilcrease v. State</i> , 318 S.W.3d 70 (Ark. 2009)	32
<i>Kinney v. People</i> , 187 P.3d 548 (Colo. 2008)	32
<i>Mitchell v. Kardesch</i> , 313 S.W.3d 667 (Mo. banc 2010)	22, 29
<i>Olden v. Kentucky</i> , 488 U.S. 227 (1988)	26
<i>People v. Ramey</i> , 604 N.E.2d 275 (Ill. 1992)	32
<i>Pointer v. Texas</i> , 380 U.S. 400 (1965)	28
<i>Sandy Ford Ranch, Inc. v. Dill</i> , 449 S.W.2d 1 (Mo. 1970)	30
<i>State v. Brooks</i> , 304 S.W.3d 130 (Mo. banc 2010)	38
<i>State v. Conley</i> , 938 S.W.2d 614 (Mo. App. E.D. 1997)	38
<i>State v. Dunn</i> , 817 S.W.2d 241 (Mo. banc 1991)	36
<i>State v. Edwards</i> , 637 S.W.2d 27 (Mo. banc 1982)	30
<i>State v. Fitzpatrick</i> , 193 S.W.3d 280 (Mo. App. W.D. 2006)	31
<i>State v. Foust</i> , 920 S.W. 949 (Mo. App. E.D. 1996)	25
<i>State v. Gilbert</i> , 121 S.W.3d 341 (Mo. App. S.D. 2003)	25

<i>State v. Johnson</i> , 700 S.W.2d 815 (Mo. banc 1985)	30, 33, 36
<i>State v. Joiner</i> , 823 S.W.2d 50 (Mo. App. E.D. 1991)	25, 30, 32, 34
<i>State v. Lockhart</i> , 507 S.W.2d 395 (Mo. 1974)	30, 33
<i>State v. March</i> , 216 S.W.3d 663 (Mo. banc 2007)	26, 34
<i>State v. Miller</i> , 650 S.W.2d 619 (Mo. 1983)	38
<i>State v. Pigques</i> , 310 S.W.2d 942 (Mo. 1958)	30
<i>State v. Quintana</i> , 621 N.W.2d 121 (Neb. 2001)	32
<i>State v. Russell</i> , 625 S.W.2d 138 (Mo. banc 1981)	36
<i>State v. Schaal</i> , 806 S.W.2d 659 (Mo. banc 1991)	29
<i>State v. Solven</i> , 371 S.W.2d 328 (Mo. banc 1963)	30
<i>State v. Thomas</i> , 118 S.W.3d 686 (Mo. App. W.D. 2003)	26, 30, 31, 33
<i>State v. Thompson</i> , 341 S.W.3d 723 (Mo. App. E.D. 2011)	34
<i>State v. Watts</i> , 813 S.W.2d 940 (Mo. App. E.D. 1991)	33
<i>State v. Winfrey</i> , 337 S.W.3d 1 (Mo. banc 2011)	30
<i>United States v. Abel</i> , 469 U.S. 45 (1984)	37
<i>United States v. Dale</i> , 614 F.3d 942 (8th Cir. 2010)	32
<i>United States v. Touchstone</i> , 726 F.2d 1116 (6th Cir. 1984)	34

RULES

Rule 83.04.....	5
-----------------	---

STATUTES

Section 477.050.....	5
----------------------	---

CONSTITUTIONAL PROVISIONS

Mo. Const. Art. I, Secs. 10 and 18(a)	22, 23, 24, 29
Mo. Const. Art. V, Sec. 9.....	6
Mo. Const., Art. V, Sec. 3.....	6
U.S. Const., Amend. V, VI, XIV	22, 23, 24, 29, 38

JURISDICTIONAL STATEMENT

Appellant, Jermane Clark, was convicted on April 21, 2010 of the class A felony of murder in the first degree, a violation of Section 565.020,¹ and armed criminal action, a violation of Section 571.015. On July 1, 2010, the court sentenced Mr. Clark to terms of life imprisonment without the possibility of parole for murder in the first degree, and a concurrent term of life imprisonment for armed criminal action.

Mr. Clark timely filed his notice of appeal on July 6, 2010. This appeal was initially heard in the Missouri Court of Appeals, Eastern District. Mo. Const., Art. V, Sec. 3; Section 477.050. After a summary order affirming judgment by the Court of Appeals, Eastern District, this Court ordered transfer on October 4, 2011 after Mr. Clark's application. Mo. Const. Art. V, Sec. 9; Rule 83.04.

¹ All statutory citations will be to the Missouri Revised Statutes (2000).

STATEMENT OF FACTS

Morris Thompson was shot and killed behind a vacant four-family flat in North St. Louis on December 28, 2008. Tr. 201, 230, 279.² Police officer Damon Willis found his body later that day. Tr. 201. At the scene, Detective Jimmy Hyatt recovered a bullet from inside Mr. Thompson's leather jacket. Tr. 208. The bullet had passed through Mr. Thompson's chest, causing his death. Tr. 209, 307. Detective Hyatt also gathered other evidence: sunglasses, the clothing Mr. Thompson was wearing, and a plastic bag with an open bag of cookies inside. Tr. 209, 210. Another officer canvassed the area. Tr. 217. These efforts yielded no new evidence or leads. Tr. 217-218.

Two days later, on December 30, 2008, Officer Willis received a dispatch reporting a man named "Glenn" with a handgun near where he had found Mr. Thompson. Tr. 202-203. As Officer Willis arrived, Glenn Shelby fled. Tr. 203. Shelby ran from Officer Willis on foot through alleyways and gangways. Tr. 204.

² Appellant will cite to the Record on Appeal as "L.F" (legal file) and "Tr." (transcript).

The officer finally caught and arrested Shelby. Tr. 204. Shelby gave the officer the gun, which he had thrown in a trash container. Tr. 204.

On January 2, 2009, homicide detectives assigned to investigate Mr. Thompson's death learned through ballistics testing that Shelby's gun was the murder weapon. Tr. 317, 348. Detectives began looking for Shelby that day and arrested him again on January 20, 2009. Tr. 318. Under questioning, Shelby told Detective Heather Sabin that it had been his practice to keep his gun hidden in various places around the neighborhood. Tr. 319. He told Detective Sabin that on December 28, 2008, he had given his gun to a man named Jermane. Tr. 319. Detective Sabin had Shelby look through pages of pictures of men with the first name Jermane, and Shelby picked out Appellant, Jermane Clark. Tr. 219, 227, 322.

Shelby had been with a man named Maurice Payne that day. Tr. 323. Police questioned Payne on January 22, 2009. Tr. 324, 335. Payne told Detective Sabin that "he was out there" when Mr. Thompson was shot. Tr. 324. According to Payne, he only intended "to sell some drugs to the victim" and he and Mr. Thompson "went behind a vacant building to make the transaction." Tr. 324. But Payne told the detective that Mr. Clark, who was also present, drew a gun and

shot Mr. Thompson. Tr. 324. Until Shelby had been arrested with the murder weapon, neither Payne nor Shelby had previously told the police they had information about Mr. Thompson's death. Tr. 238, 285, 297.

Based on Shelby's and Payne's claims, the State charged Mr. Clark with the crimes of murder in the first degree, robbery in the first degree, and two counts of armed criminal action. L.F. 9-10.

On January 23, 2009, Mr. Clark voluntarily turned himself into police after learning he was wanted. Tr. 326, 333. Mr. Clark consented to a search of his apartment, as well as the search of a book bag he kept at his girlfriend's apartment. Tr. 328-329, 334. Approximately fifty calls had been made from the victim's cell phone after the shooting. Tr. 326-327. The police investigated all of the calls, and none had any connection to Mr. Clark. Tr. 326-327.

Shelby testified that on December 28, 2008, he was hanging around in front of a vacant building at 4338 Lee with Mr. Clark and Payne. Tr. 230. Mr. Thompson approached and asked if they had any crack cocaine to sell. Tr. 231. Mr. Clark asked Shelby if he could sell Mr. Thompson fake crack cocaine. Tr. 232. Shelby replied that he didn't care. Tr. 231. Shelby then gave Mr. Clark his gun and left. Tr. 232.

Afterwards, Shelby said he stopped at a nearby house to use the bathroom and then walked to the store with his sisters. Tr. 233, 234. It took him a couple of minutes to reach Yeatman Market. Tr. 235. On the way, he heard a shot. Tr. 235. He left the store after about five minutes and returned to the house, where he made a phone call. Tr. 236, 251.

According to Shelby, when he saw Mr. Clark later, Mr. Clark told him he “tried to gank the dope [fiend] first, which means sell him fake crack, but he wasn’t going for it so he tried to rob him.” Tr. 237. Mr. Clark told him he stole the victim’s cell phone and shot him. Tr. 237. Then Mr. Clark gave Shelby back the gun. Tr. 237, 252. Shelby saw Payne two hours later, and they spoke for about five minutes. Tr. 249, 285, 298. By this time, police had arrived in the area. Tr. 238.

Maurice Payne testified at trial that he had known Shelby and Mr. Clark for several years. Tr. 275, 292. Payne admitted to prior convictions for tampering in the first degree and possession of a controlled substance, as well as burglary in the second degree and stealing. Tr. 276-277. He had pleaded guilty to the latter two charges but had not been sentenced yet. Tr. 277.

He testified that on December 28, 2008, he was with Shelby and Mr. Clark at Lee and Clarence. Tr. 278. Mr. Thompson approached to buy crack cocaine, and Payne directed him behind a vacant building. Tr. 279. After Mr. Thompson gave Payne \$30 for three rocks of crack cocaine, Mr. Clark demanded Mr. Thompson's money. Tr. 280-81. According to Payne, he saw Mr. Clark point a gun at the victim and shoot him. Tr. 281, 283.

Mr. Clark then went through Mr. Thompson's pockets. Tr. 297. Payne did not know where the gun was at that time. Tr. 297. He saw Shelby later that day. Tr. 285, 297. Earlier in the day, Shelby had given him the gun that was used to shoot Mr. Thompson. Tr. 294. Payne had already given the gun back to Shelby when Mr. Clark shot Mr. Thompson. Tr. 294. At trial, he had no memory of previously speaking to the police about this incident. Tr. 301-302. Payne admitted that he and Mr. Clark had problems over the years but said he had "no beef" with Mr. Clark. Tr. 293.

Before Payne testified, counsel for Mr. Clark raised an area of cross-examination of Payne that he intended to explore:

THE COURT: All right. [W]e had an off the record discussion this morning before Mr. Payne was brought here because Mr. Payne

is currently residing as a guest of the City of St. Louis as a result of a different case, which is case number -- and correct me -- I'm going to recite the facts as I understand them and then the two of you can correct me if I'm wrong. That he has pending Cause No. 0922-CR06356-01, State of Missouri versus Maurice Payne. It is a burglary second charge and a theft, stealing less than five hundred dollars charge. The offense date is August 28, 2009. And looking at the minutes, it looks like he entered a guilty plea to me on those charges on March the 24th of this year, 2010. And he has not been sentenced because, at his attorney's request, the matter was sent -- referred to post-plea drug court, and he is currently awaiting release so that he can enroll in and participate in the post-plea drug court.

Now, I was told earlier that a deposition was taken of Mr. Payne on March the 10th and that in his deposition some indication was given that he may have expected some leniency or some kind of benefit out of his testimony in this trial. And so now where are we, Mr. Farishon?

MR. FARISHON: Your Honor, I have spoken with Mr. Payne and he has indicated to me that he does hope or -- I'm not gonna say expect. But he does hope or think that he wants to gain some sort of benefit or some sort of positive outcome through his participation and compliance in this case.

THE COURT: And you want to ask him that on the witness stand in this trial?

MR. FARISHON: That is correct.

THE COURT: You want to ask him, first of all, about his guilty plea. Correct?

MR. FARISHON: Well, I believe that that's -- I'm entitled to that for sure.

THE COURT: And Ms. Gilliam, I think you agree with that much. Correct?

MS. GILLIAM: Yes.

THE COURT: And then you want to go on, Mr. Farishon, and you want to question him about what he hopes or expects might

happen in his other pending case as a result of his participation in this case?

MR. FARISHON: Correct. Because he has not been sentenced at this point. And any attorney would be very remiss in not pointing out a client's participation in the justice system on the positive side.

Tr. 266-268.

The Court then asked for the State's response. The State responded that it believed it was "okay" that Payne hoped that his testimony for the State would benefit his own case, and that it was wrong, and more prejudicial than probative, for Mr. Clark to ask questions that would portray Payne as "dishonest simply based on his desires" for leniency from the State based upon his testimony for the State:

MS. GILLIAM: Your Honor, I mean again, I think my response has been he's trying to portray Mr. Payne as being dishonest because he has a hope or a wish to -- but it's not that -- he didn't ask Mr. Payne are you being dishonest because you want a deal. He asked him are you -- is that your hope. And that's okay if that's his hope. I mean, you know, he is in a position right now where he

hopes that. But he also is in a position where he's made – he's pled guilty and he's getting a sentence that is already set by this Court. He's being referred into post-plea drug court, so he will be released and will be on his own best behavior at that point. It will be up to him and his responsibility alone to comply with whatever post-plea drug court wants him to do. So I mean while he may hope something -- I mean Glenn Shelby may hope in six months if he gets arrested that because he testified here, it would help him out. But that doesn't mean that it would in the future. So I mean I just don't think that -- I think he's trying to portray and paint him as being dishonest simply based on his desires.

THE COURT: So what's the objection to him asking that question?

MS. GILLIAM: My objection is that it's more prejudicial than probative. It's irrelevant what his hopes are. And I think that there's no basis for him to then argue that he's being dishonest because he has a desire or a wish to get -- I mean if the sentence was still open and that we could still come back later and say okay, we want at

sentencing, but that's not the case. The case here is that he's in post-plea drug court. And, you know, he wants to give you a hypothetical if he fails, but I mean Mr. Payne can also be very successful and be discharged and graduate just fine.

Tr. 268-269.

The Court prohibited cross-examination of Payne on this matter, based on the fact that Payne's pending case was "a totally different case" and because Payne "had no deal" with the State:

THE COURT: All right. Based on what I've heard so far – I'm going to give you a chance to correct that in a minute, Mr. Farishon. Based on what I've heard so far, I will sustain that objection. I think that Mr. Payne, his other plea is in a totally different case. He entered the plea in front of me and he entered the plea after the indication that he may have given at his deposition. He entered his plea on March 24. If he told you something that he was expecting something, he said that on March the 10th. When he entered the plea in front of me, he had no deal at all with the State. He has really no deal with me except that his attorney convinced me to refer him

to post-plea drug court, which I did. And the only conditions he has are those imposed by cooperation and completion of post-plea drug court. That's it. So in light of that, I would sustain that objection. If you want to make a record and ask him some questions now, swear him in and ask him some questions and do an offer of proof, I'm fine with that.

Tr. 269-270. Counsel responded that he was attempting to discredit Payne's testimony based on the fact that Payne's testimony was given with a hope of leniency from the State in the pending case. Tr. 270. Further, counsel argued that he needed to explore every reason why Payne was not credible:

I have to probe into every single reason why Mr. Payne might be trying to help the State. And this is a major, major, major reason why he might be trying to help the State.

Tr. 271. Counsel argued that if Payne fails to complete the drug court program, he has an open-ended sentence from one day of probation to sixteen years in prison. Tr. 271. He argued that at Payne's sentencing, Payne's attorney would point to Payne's testimony for the State in Mr. Clark's case as a mitigating fact. Tr. 271.

The Court, again, stated that the fact that there was “no deal” for Payne’s testimony was dispositive, stating, “Well, his arrangement is if he completes the drug court, then he’s finished. But that’s his condition. And he had no representation from the State, absolutely none, absolutely no deal, and that was clear at the guilty plea.” Tr. 271-272. Counsel then presented the following offer of proof:

MR. FARISHON: I also would like to constitutionalize the objection.

Failure to allow this in violates client’s right to due process, fair trial.

THE COURT: The objection will still be sustained.

MR. FARISHON: Thank you.

THE COURT: I am letting you ask him about drug court. And I think you’re free to ask him if he’s been sentenced. But in terms of what he expects, he’s already given his expectation at the guilty plea and he’s made it clear that he – that no promises have been made and that he has no expectation.

MR. FARISHON: Right. And Mr. Payne, let’s go from there. Do you expect -- you have not been sentenced. Correct?

THE WITNESS: No, sir.

MR. FARISHON: And you understand that the full range of punishment is open to you if you do fail out of drug court?

THE WITNESS: Yes, sir.

MR. FARISHON: And do you hope that your testimony here today is going to help you in some way?

THE WITNESS: I hope so.

MR. FARISHON: And do you hope that it would help you if you do fail out of drug court?

THE WITNESS: Yes, sir.

MR. FARISHON: And do you hope that if you are not successful in drug court that your attorney would use this testimony in a positive way for your benefit?

THE WITNESS: Yes, sir.

MR. FARISHON: And is that going to influence your testimony here in any way?

THE WITNESS: No, sir.

MR. FARISHON: And nothing's been promised to you. Right?

THE WITNESS: No, sir.

MR. FARISHON: But this is just something that you think in your head that is going to help you out?

THE WITNESS: Yes, sir.

MR. FARISHON: I have no further questions. I'm sorry. One moment. We would also constitutionalize based on Sixth Amendment, and we would ask once more based upon his testimony that we be allowed to inquire.

THE COURT: Ms. Gilliam, do you have any questions?

MS. GILLIAM: No questions.

THE COURT: And that's the end of your offer of proof?

MR. FARISHON: Yes.

THE COURT: All right. The objection will be sustained. And we'll bring the jury down.

Tr. 272-274.

On April 21, 2010, the jury returned verdicts of guilty of the class A felony of murder in the first degree and armed criminal action. L.F. 40-41. On July 1, 2010, the court sentenced Mr. Clark to terms of life imprisonment without the

possibility of parole for murder in the first degree, and a concurrent term of life imprisonment for armed criminal action. L.F. 48-50.

This appeal followed. L.F. 52.

POINT RELIED ON

I - The trial court erred in sustaining the State's objection and prohibiting cross-examination of adverse witness Maurice Payne about his hope for leniency in a pending criminal case, because so restricting cross-examination violated Mr. Clark's rights to due process, a fair trial, and to confront and cross-examine witnesses against him as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that (1) such cross-examination would have exposed Payne's bias, interest, and motive to testify favorably for the State based on his subjective hope of leniency from the same prosecutor, (2) a witness's bias, interest, and motive is always legally and logically relevant, and (3) its exclusion was not harmless beyond a reasonable doubt because the State's case was not overwhelming: Payne was the only alleged eyewitness to the shooting, Shelby and Payne's accusations were not corroborated by any other evidence, and there was no other opportunity to cross-examine Payne on this matter.

Davis v. Alaska, 415 U.S. 308 (1974)

Delaware v. Van Arsdall, 475 U.S. 673 (1986)

Mitchell v. Kardesch, 313 S.W.3d 667 (Mo. banc 2010)

State v. Winfrey, 337 S.W.3d 1 (Mo. banc 2011)

U.S. Const., Amend. V, VI, XIV

Mo. Const., Art. I. Secs. 10 and 18(a)

ARGUMENT

I - The trial court erred in sustaining the State's objection and prohibiting cross-examination of adverse witness Maurice Payne about his hope for leniency in a pending criminal case, because so restricting cross-examination violated Mr. Clark's rights to due process, a fair trial, and to confront and cross-examine witnesses against him as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that (1) such cross-examination would have exposed Payne's bias, interest, and motive to testify favorably for the State based on his subjective hope of leniency from the same prosecutor, (2) a witness's bias, interest, and motive is always legally and logically relevant, and (3) its exclusion was not harmless beyond a reasonable doubt because the State's case was not overwhelming: Payne was the only alleged eyewitness to the shooting, Shelby and Payne's accusations were not corroborated by any other evidence, and there was no other opportunity to cross-examine Payne on this matter.

Preservation

Before Payne testified, counsel informed the trial court that he intended to cross-examine Payne about his hope for leniency from the State in a pending case

in the City of St. Louis. Tr. 226-267. The prosecutor objected and asked the court via an oral motion in limine to prevent cross-examination on this topic. Tr. 269. After argument, the court sustained the State's motion and prohibited Mr. Clark's lawyer from cross-examining Payne on this issue. Tr. 270. Counsel made an offer of proof by eliciting Payne's testimony outside of the hearing of the jury. Tr. 272. Counsel then included the issue in a timely-filed motion for new trial. L.F. 44.

Because Appellant's cross-examination on this issue was prevented by a trial court order, following an oral motion in limine by the State, this matter was properly preserved by (1) making an offer of proof, and (2) alleging error in the timely-filed motion for new trial. *State v. Joiner*, 823 S.W.2d 50, 52 (Mo. App. E.D. 1991). The error is preserved for this Court's review.

Standard of Review

Trial courts have broad discretion to admit or exclude evidence at trial, and the reviewing court will reverse only if it finds a clear abuse of discretion. *State v. Gilbert*, 121 S.W.3d 341, 344 (Mo. App. S.D. 2003). But when the trial court misapplies the law, the ruling is not due the same deference as is an exercise of discretion. *State v. Foust*, 920 S.W. 949, 955 (Mo. App. E.D. 1996). While a trial court has the discretion to impose reasonable limits on cross-examination,

preventing the accused from revealing bias, motive, or prejudice necessary for the jury's evaluation of an adverse witness' credibility is "limitation beyond reason." *Olden v. Kentucky*, 488 U.S. 227, 232 (1988). "The scope of a judge's discretion ends at the threshold of the rights secured by the Confrontation Clause of the Constitution." *State v. Thomas*, 118 S.W.3d 686, 690 (Mo. App. W.D. 2003).

Confrontation Clause violations are subject to the harmless error test found in *Chapman v. California*, 386 U.S. 18, 24 (1967). *State v. March*, 216 S.W.3d 664, 667 (Mo. banc 2007). That test requires that the error be harmless beyond a reasonable doubt, meaning that "there is no reasonable doubt that the error's admission failed to contribute to the jury's verdict." *Id.*

Relevant Facts

The court discussed this issue with the parties before Payne testified. Tr. 265. The State informed the court, "no deals, or promises or inducements" had been made with either Payne or Shelby. Tr. 265. The parties agreed that Payne had pending cases in the City of St. Louis. Tr. 266. The charges were the class C felony of burglary in the second degree and stealing of less than five hundred dollars, a class A misdemeanor. Tr. 266. He had entered a guilty plea to the charges on March 24, 2010. Tr. 266. He had not yet been sentenced. Tr. 266. He

was scheduled to enter a drug court program. Tr. 269-270. If he failed to follow the rules of that program, he would be sentenced and face the full range of punishment. Tr. 273. The range of punishment was up to 16 years of incarceration. Tr. 271.

The parties agreed that counsel could ask Payne about his guilty pleas to burglary and stealing, though he had not yet been sentenced on those charges. Tr. 267. But the State objected to any questions about whether Payne had a hope of leniency or belief that he might benefit from his testimony at Mr. Clark's trial. Tr. 268, 269. The State argued that the proposed cross-examination was an improper attempt to portray the witness as "dishonest" and should not be allowed. Tr. 268.

The State further argued, "[counsel's] trying to portray and paint him as being dishonest simply based on his desires" for leniency or benefit. Tr. 269. The State also argued that testimony about Payne's expectation of leniency was more prejudicial than probative and irrelevant. Tr. 269.

The trial court ruled in favor of the State and barred Mr. Clark from asking Payne about his hope or expectation of leniency for his testimony. Tr. 269. The court reasoned that Payne's pending legal problems were a "totally different case"

and that he had “no deal” with the State in exchange for his testimony. Tr. 270. The court held that the fact that Payne had “no deal” with the State in the burglary and stealing cases meant that Mr. Clark could not cross-examine Payne on this matter. Tr. 272.

Counsel made an offer of proof. Tr. 272. Payne testified outside the hearing of the jury that he faced the full range of punishment as a persistent felony offender in his pending cases if he failed the drug court program. Tr. 273. He hoped his testimony in Mr. Clark’s trial would help him in the pending cases. Tr. 273. He wanted his attorney, if and when he was sentenced, to use his testimony for the State in a positive way for his benefit. Tr. 273. His testimony would not be affected by his hope that he would benefit. Tr. 273. The Court sustained the State’s objection and would not allow cross-examination on this topic. Tr. 274.

The Trial Court Erred

The trial court’s ruling was incorrect. Mr. Clark had a right to confront and cross-examine this witness against him, as expressed in the Confrontation Clause of the Sixth Amendment to the United States Constitution, and extended to defendants in state prosecutions by incorporation through the Fourteenth

Amendment. *Pointer v. Texas*, 380 U.S. 400, 406 (1965). The Missouri Constitution provides a coextensive guarantee in Article I, Section 18(a). *State v. Schaal*, 806 S.W.2d 659, 662 (Mo. banc 1991). The Confrontation Clause assures the defendant the opportunity to cross-examine an adversarial witness, which is the principal means for testing his credibility and the truth of his testimony. *Davis v. Alaska*, 415 U.S. 308, 315-316 (1974).

“[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness.” *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). The introduction of evidence of a prior crime is a “general attack on the credibility of the witness.” *Davis*, 415 U.S. at 316. In contrast, a party reveals a “prototypical form of bias” when he makes “a particular attack on the witness’ credibility, effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand” *Id.*

In accordance with these principles, “[i]t has long been the rule in Missouri that on cross-examination a witness may be asked any questions which tend to

test his accuracy, veracity or credibility.” *Mitchell v. Kardesch*, 313 S.W.3d 667, 670 (Mo. banc 2010) (citing *Sandy Ford Ranch, Inc. v. Dill*, 449 S.W.2d 1, 6 (Mo. 1970)). “Cross-examination about any issue is permissible if it shows the bias or interest of the witness.” *State v. Winfrey*, 337 S.W.3d 1, 5 (Mo. banc 2011) (citing *State v. Solven*, 371 S.W.2d 328, 332 (Mo. banc 1963)). Even when interest or bias is admitted by the witness, the extent of it may be shown. *State v. Edwards*, 637 S.W.2d 27, 29 (Mo. 1982) (citing *State v. Pigques*, 310 S.W.2d 942 (Mo. 1958)).

As a general rule, a witness’s credibility may not be impeached by evidence of bad character shown by pending charges that have not resulted in a conviction. *Thomas*, 118 S.W.3d at 689-691 (citing *State v. Wise*, 879 S.W.2d 494, 510 (Mo. banc 1994)). However, a defendant must be able to show the potential bias or interest of a witness in the outcome of a case where: (1) the witness has a specific interest; (2) the witness has a possible motivation to testify favorably for the government; or (3) the testimony of the witness was given with an expectation of leniency. *State v. Lockhart*, 507 S.W.2d 395, 396 (Mo. 1974); *Joiner*, 823 S.W.2d at 52-53.

“[T]he interest or bias of a witness and his relation to or feeling toward a party are never irrelevant matters.” *Mitchell*, 313 S.W.3d at 676 (citing *State v.*

Johnson, 700 S.W.2d 815, 817 (Mo. banc 1985) and *Edwards*, 637 S.W.2d at 29)).

The court has some discretion to limit the extent of cross-examination on any particular relevant topic, but “[c]ross-examination about any issue, regardless of its materiality to the substantive issues at trial, is permissible if it shows the bias or interest of the witness because a witness’s bias or interest could affect the reliability of the witness’s testimony on any issue.” *Mitchell*, 313 S.W.3d at 676.

The trial court erred and abused its discretion in sustaining the State’s objection. The prosecutor argued that she had no deal with Payne, that Payne’s cases were separate from Mr. Clark’s case, and therefore Payne’s expectation in his pending cases was irrelevant. Tr. 268-269. The trial court ruled as it did based on the fact that there was no deal with the State in Payne’s pending cases and that Payne’s cases were unrelated to Mr. Clark’s case. Tr. 269-270.

This rationale, requiring some explicit promise by the state or nexus between Payne’s case, was incorrect. The law is clear that “the defendant is entitled to cross-examine as to pending criminal charges brought by the same prosecutor even if there is no deal, and even if the witness merely perceives a possible benefit for himself by doing so.” *Thomas*, 118 S.W.3d at 691; *see, e.g., State v. Fitzpatrick*, 193 S.W.3d 280, 289 (Mo. App. W.D. 2006) (where defendant

cross-examined adverse witness about witness's "hope" that federal government would not pursue unrelated charges against him based on his testimony for the State); *United States v. Dale*, 614 F.3d 942, 957 (8th Cir. 2010) (where adverse witness had pleaded guilty in unrelated federal case, the defendant cross-examined witness on his "hope for a downward departure" in sentencing, and "hope for leniency" in that case); *Kinney v. People*, 187 P.3d 548, 560 (Colo. 2008) (holding that a defendant must be given the opportunity to explore adverse witness's "hope or expectation of immunity or leniency with respect to . . . pending charges against the witness."); *Gilcrease v. State*, 318 S.W.3d 70, 77 (Ark. 2009) (where defendant cross-examined adverse witness, who was also an accomplice, on "expectation or hope of immunity or leniency"); *State v. Quintana*, 621 N.W.2d 121, 132 (Neb. 2001) (holding that defendant was entitled to cross-examine adverse witness on his "personal desire to curry favor with law enforcement" regarding an offense for which he had been arrested but not yet charged); *People v. Ramey*, 604 N.E.2d 275, 287-288 (Ill. 1992) (holding that the defendant was entitled to cross-examine adverse witness on witness's hope that the State would consider his testimony at sentencing in his own pending case).

“When showing bias, it is not necessary to prove the existence of a deal or the state’s willingness or unwillingness to deal.” *Joiner*, 823 S.W.2d at 54. “What is relevant is the witness’ knowledge of these facts, his perception of expectancy of favorable treatment if he furthers the state’s case, or his basis to fear harsh treatment if his testimony is unfriendly.” *Id.*

Here, Payne’s testimony would have demonstrated self-interest in the case, because he perceived a possible benefit for himself in his own pending case. *Lockhart*, 507 S.W.2d at 396; *Thomas*, 118 S.W.3d at 691. While he acknowledged the State had not promised him a particular sentence, and that is not disputed, Payne nevertheless hoped that his testimony for the State would help him and expected that his lawyer would use his cooperation with the State for his own benefit. Tr. 273-274.

Finally, while the trial court is afforded discretion in limiting cross-examination, that discretion is meant to ensure the trial is free from unnecessary repetition or harassment of witnesses. *State v. Watts*, 813 S.W.2d 940, 943 (Mo. App. E.D. 1991). In this Court’s case of *State v. Johnson*, for example, the defendant sought to use extrinsic evidence to demonstrate the hostility of an adverse witness on topics that he had “relatively broad license” to explore in

cross-examination of the same witness. 700 S.W.2d at 818. This Court held that though he was not permitted to duplicate the areas of cross-examination with extrinsic evidence, his cross-examination of the witness on the same topics (personal animus and racial bias) nevertheless enabled the jury to make a “discriminating appraisal” of these particular biases. *Id.* at 819 (*citing United States v. Touchstone*, 726 F.2d 1116, 1123 (6th Cir.1984)). *Johnson* illustrates that while the court does have some discretion to limit cross-examination to prevent repetition in a particular area of cross-examination, it has no discretion to foreclose cross-examination on a relevant topic completely as the court did here.

Prejudice

The standard for prejudice is whether the error was harmless beyond a reasonable doubt, meaning that “there is no reasonable doubt that the error’s admission failed to contribute to the jury’s verdict.” *March*, 216 S.W.3d at 667; *Joiner*, 823 S.W.2d at 54. The standard of review includes a presumption of prejudice. *State v. Thompson*, 341 S.W.3d 723, 733 (Mo. App. E.D. 2011) (*citing State v. Norman*, 145 S.W.3d 912, 919–920 (Mo. App. S.D. 2004)). Only “[i]f the proof of defendant’s guilt was overwhelming [will] the state will have rebutted the presumption of prejudice.” *State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003).

In addition to these general principles, in determining whether the denial of the right to cross-examine is harmless beyond a reasonable doubt, courts may consider “a host of factors, all readily accessible to reviewing courts,” such as:

- (1) the importance of the witness’ testimony in the prosecution’s case;
- (2) whether the testimony was cumulative;
- (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;
- (4) the extent of cross-examination otherwise permitted; and
- (5) the overall strength of the State’s case.

Van Arsdall, 475 U.S. at 684.

Each of these factors weighs against the State. As to the first two factors, Payne was the State’s primary witness. He claimed to see Mr. Clark shoot Mr. Thompson. Tr. 280-283. The State urged the jury to believe Payne “testified truthfully as to what he saw that day.” Tr. 386. The prosecutor argued that Payne and Mr. Clark were “friendly” and that Payne had no reason to lie. Tr. 386. Shelby, the State’s only other witness, did not claim to have witnessed who shot Mr. Thompson and had been arrested after possessing the gun two days after the crime. Tr. 203, 232, 237, 251. “Where a case stands or falls on the jury’s belief or

disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." *Joiner*, 823 S.W.2d at 54. Payne's testimony was essential for a conviction, and was not cumulative of other evidence. *Compare State v. Dunn*, 817 S.W.2d 241, 245 (Mo. banc 1991) (finding no prejudice from erroneous limitation on cross-examination because "all of the evidence appellant sought to elicit . . . was before the jury through other testimony").

As to the third and forth factors, these also weigh against the State: there was no evidence, other than Payne's and Shelby's testimony, that Mr. Clark committed this crime. And while Payne admitted he had problems with Mr. Clark in the past, he maintained that he has "no beef" with Mr. Clark and the prosecutor argued they were friendly. Tr. 293, 386; *compare Johnson*, 700 S.W.2d at 818 (where extrinsic evidence of a witness's hostility was excluded, nevertheless, "a reasonable jury could not have been anything but very much aware of [the witness's] antipathy for defendant" based on other testimony).

Further, while Payne was asked about his memory and prior convictions, these questions went to his general credibility. Mr. Clark was not allowed to reveal a more probing, specific, "prototypical form of bias" demonstrating that Payne's testimony was colored by hope for personal benefit. *Davis*, 415 U.S. at

316; *see State v. Russell*, 625 S.W.2d 138, 139 (Mo. banc 1981) (distinguishing between “general attacks on credibility” such as that those revealed by a witness’s prior criminal convictions, and a specific bias, self-interest, or motive of the witness). “Bias may be induced by a witness’ like, dislike, or fear of a party, or by the witness’ self-interest.” *United States v. Abel*, 469 U.S. 45, 52 (1984). Unlike general attacks on credibility, “[p]roof of bias is almost always relevant because the jury, as a finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.” *Id.*

Finally, as to the last factor, the State built its case against Mr. Clark based entirely on the unsubstantiated claims of Payne and Shelby. Put simply, not one piece of evidence corroborated the story that Shelby and Payne told.

Furthermore, there was evidence that Payne and Shelby falsely accused Mr. Clark of this crime. Mr. Clark voluntarily turned himself in to police on January 23, 2009 after learning he was wanted, just days after Payne and Shelby made their statements to the police. Tr. 326, 333. Mr. Clark consented to a search of his apartment, as well as the search of a book bag he kept at his girlfriend’s apartment. Tr. 328-329, 334. Further, someone, presumably the killer or one of

his associates, made approximately fifty calls from the victim's stolen cell phone. Tr. 326-327. The police investigated all of the calls and none had any connection to Mr. Clark. Tr. 326-327. Because of the weakness of the State's case, a complete picture of Payne's admitted self-interest in the proceedings was essential to a fair and reliable conviction.

The State cannot demonstrate that the error in this case was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24; *see State v. Conley*, 938 S.W.2d 614, 621 (Mo. App. E.D. 1997) (error was not harmless beyond a reasonable doubt when "the victims' testimony was not corroborated by independent witnesses" and "there was no medical or other physical evidence presented at the trial to corroborate the charged crimes"); *State v. Brooks*, 304 S.W.3d 130, 138 (Mo. banc 2010) (error was not harmless beyond a reasonable doubt even when evidence of guilt was "substantial but not overwhelming" and defense was merely "not transparently frivolous"); *compare State v. Miller*, 650 S.W.2d 619, 621 (Mo. banc 1983) (error was harmless beyond a reasonable doubt when record was "replete with evidence of [the defendant's guilt] including two admissions by the defendant and several independent witnesses).

This Court must reverse and remand for a new trial.

CONCLUSION

Appellant asks this Court to reverse and remand this case for a new trial.

Respectfully submitted,

s/ Jessica M. Hathaway
Jessica M. Hathaway, Mo. Bar #49671
Office of the State Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
Phone: (314) 340-7662
Fax: (314) 340-7685
jessica.hathaway@mspd.mo.gov

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I certify that a copy of this brief was served via the Court's electronic filing system to Mr. Robert J. Bartholomew of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 on **October 31, 2011**. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Plantagenet Cherokee 13-point font. The word-processing software identified that this brief contains **7,161** words. Also, the electronic copy of this brief submitted to the Court and served upon opposing party has been scanned for viruses by an updated copy of Symantec Endpoint Protection virus-protection software found to be virus-free.

s/ Jessica M. Hathaway

Jessica M. Hathaway, Mo. Bar #49671
Office of the State Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
Phone: (314) 340-7662
Fax: (314) 340-7685
jessica.hathaway@mspd.mo.gov
ATTORNEY FOR APPELLANT